

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

JAM PRODUCTIONS, LTD. AND EVENT PRODUCTIONS,
INC., A SINGLE EMPLOYER,

and

Case 13-CA-177838

THEATRICAL STAGE EMPLOYEES UNION LOCAL NO. 2, IATSE.

Kevin McCormick, Esq., Counsel for the General Counsel
Greg Shinall, Esq. (Sperling & Slater), Chicago, IL, and
Steven L. Gillman (Holland & Knight LLP), Chicago, IL,
for the Respondent
*David Huffman-Gottschling, Esq. (Jacobs, Burns, Orlove
& Hernandez)*, Chicago, IL, for the Charging Party

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried on a stipulated record. Theatrical Stage Employees Union Local No. 2, IATSE (the Union) alleges that Respondents, Jam Productions, Ltd. (Jam) and Event Productions, Inc. (Event Productions) violated Section 8(a)(3), (4) and (1) of the National Labor Relations Act (the Act)¹ by failing to reinstate 55 stagehands in accordance with the settlement agreement in a prior Board proceeding relating to their mass termination. The primary issue in this case is whether the phrase, “immediate and full participation in the on-call list,” required a return to the status quo ante, thus giving the 55 stagehands seniority or other preference over the stagehands who replaced them, or simply the right to be offered work assignments equally with their replacements.

On the entire record, including my consideration of the stipulated record and the briefs filed by the General Counsel, the Respondent and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Jam is an Illinois corporation with an office and place of business in Chicago, Illinois, is engaged in the business of promoting and producing concerts, shows, and events by various performers, at various venues in Chicago, Illinois. Event Productions, Inc., an Illinois

¹ 29 U.S.C. §§ 151-169.

corporation with an office and place of business at the same location, has been engaged in the business of supplying labor, including stagehands, for concerts, shows, and events by various performers at venues in Chicago, Illinois. Jam and Event Productions are a single-integrated business enterprise and a single employer within the meaning of the Act, and are employers engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Shaw Crew*

For many years prior to September 16, 2015, Chris Shaw was a part-time employee of Event Productions, with day-to-day responsibilities as the crew manager in charge of offering and assigning work to part-time stagehands at the Riviera Theatre (the Riviera). He reported to Nick Miller (a Vice President and the head talent buyer for the club department at Jam) and/or Kevin Lynch (the production manager at the Riviera). Neither Event Productions nor Jam provided Shaw with written policies or procedures governing how he or any other crew manager or production manager should offer and assign work to the part-time stagehands at the Riviera. Moreover, neither Event Productions nor Jam authorized or requested Shaw to use a system providing seniority or any other privileges to stagehands based on length of service.

Prior to September 16, 2015, Shaw typically assigned stagehands from the aforementioned group of part-time employees to fill the crews for shows at the Riviera (the Shaw Crew): Danny Alvarez, Mike Alvarez, James Bartolini, Karlis Baumanis, Brent Benson Jr., Lester Berry, Edward J. Bilecki, Scott Bulawa, Todd Carter, Christopher C. Chambers, Don Corney, Nick Curry, Alek Dombrovskis, Jerome Fritz, Zachary Fritz, Tom Garrity, Willie Gee, Christopher Glazebrook, Bryan Gonzalez, Sean D. Gunn, Justin Huffman, Joe Kelly, Gregor Kramer, Chris Leggett, Joe Lyons, Bryan Mangnall, Michael Mulvey, Quintin Muntaner, Bertil Peterson, Chris Phipps, Martin Pollack, Paul Repar, Adam Ross, Tom Roszel, Eric D. Sanders, Brad Sikora, Louis Svitek Jr., Gabriel Thompson, Paul Wright, Archie Yumping, Steph Tremius, Devonte Jackson, Charlie Naese, James Curry, Evon Peterson, Kristopher Brunnell, Joe McNulty, Tim Taylor, Ken Kinder, Mike Howe, Kasia Kozsiol, Eric Pospishil, Louis Svitek IV, Dan May, and Peter Falk.

Prior to September 16, 2015, Shaw typically assigned employees from the Shaw Crew to Riviera events after receiving a call and an “Advanced Sheet” from Lynch telling him how many people were needed for the event. Shaw usually called crew members in order of seniority, with few exceptions. An example where talent superseded seniority was when a sound monitor controller was needed. Shaw would generate a Jam payroll timesheet for each show, recording the hours worked and entering the hourly pay rates established by Jam. Before or during the show, Shaw would hand the timesheet to Lynch, who would initial it along with the band production manager and submit it to the Jam talent buyer. Based on those timesheets, Jam would issue paychecks to the Shaw Crew members.² Shaw’s only other responsibilities as crew leader

² The timesheets also identify employees not listed in the aforementioned Shaw Crew who filled positions for shows other than stagehand, e.g., runner, hospitality, production, and crew call.

was to purchase performance related supplies, for which he was reimbursed. Major equipment purchases, on the other hand, were made by the Riviera's building engineer.

On September 16, 2015, Respondents discharged Shaw and the rest of the Shaw Crew from working shows at the Riviera. However, certain of these employees were permitted to work at previously-assigned shows at the Riviera on September 18 and 21, 2015 (and other previously-assigned events outside of the Riviera). Thus, the last day of employment at the Riviera for the employees who worked the September 18 and 21, 2015 shows was either September 18 or September 21, 2015, respectively.

On September 22, 2015, Event Productions hired Behrad Emami to replace Lynch as production manager and Shaw as crew manager at the Riviera. Between September 22 and 25, 2015 Emami worked with Shaw and Lynch to put together a crew for his first show on September 25, 2015. Thereafter, Emami typically assigned stagehand employees to work shows at the Riviera using a list of stagehands that he and Jason Plahutnik developed based on their experience working with stagehands at other area venues (the "New Riviera Crew"). There were 25 to 30 crew members on the initial New Riviera Crew list.³

B. The Previous Litigation

During an undetermined period of time, certain Shaw Crew members, including Justin Huffman, distributed, signed and/or collected union authorization cards.⁴ On September 17, 2015, the Union filed a petition with the National Labor Relations Board, Region 13, to represent the following individuals employed at the Riviera, Park West Theater and Vic Theater:

All full-time and regular part-time stage production employees employed by the Employer at the Riviera, Park West, and Vic Theatres, but excluding production managers and crew leaders, office clerical employees and guards, professional employees and supervisors as defined in the Act.

On September 18, 2015, the Union filed a charge in Case 13-CA-160319 alleging that Respondents discharged the aforementioned Shaw Crew employees in retaliation for their protected activity. On March 4, 2016, a Second Amended Complaint issued in Case 13-CA-160319, alleging that Respondents discharged the Shaw Crew employees in violation of the Act.

On April 6, 2016, the Regional Director of Region 13 approved a settlement agreement and notice to employees in Case 13- CA-160319. The following employees, comprising the Shaw Crew, were named in that settlement agreement: Danny Alvarez, Mike Alvarez, James Bartolini, Karlis Baumanis, Brent Benson Jr., Lester Berry, Edward J Bilecki, Scott Bulawa, Todd Carter, Christopher C Chambers, Don Corney, Nick Curry, Alek Dombrovskis, Jerome Fritz, Zachary Fritz, Tom Garrity, Willie Gee, Christopher Glazebrook, Bryan Gonzalez, Sean D

³ Joint Exh. 24 at 1-4.

⁴ Justin Huffman was also the sole member of the Shaw Crew to appear at the subsequent Representation Case hearing; and he was the Union's sole observer at each of the two sessions of the union election. There is no indication in the record, however, as to when he and others distributed, signed and collected authorization cards.

Gunn, Justin Huffman, Joe Kelly, Gregor Kramer, Chris Leggett, Joe Lyons, Bryan Mangnall, Michael Mulvey, Quintin Muntaner, Bertil Peterson, Chris Phipps, Martin Pollack, Paul Repar, Adam Ross, Tom Roszel, Eric D Sanders, Brad Sikora, Louis Svitek Jr., Gabriel Thompson, Paul Wright, Archie Yumping, Steph Tremius, Devonte Jackson, Charlie Naese, James Curry, Evon Peterson, Kristopher Brunnell, Joe McNulty, Tim Taylor, Ken Kinder, Mike Howe, Kasia Kozsiol, Eric Pospishil, Louis Svitek IV, Dan May, and Peter Falk. In the accompanying Notice to Employees ("Notice"), Respondents agreed, among other things, to offer the Shaw Crew "immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner."

The provision requiring Respondents to offer the Shaw Crew "immediate and full participation in the on-call list for work without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner" was, along with other provisions in the settlement agreement, the subject of several rounds of back-and-forth negotiation.

Initially, Region 13 proposed that the Shaw Crew be offered "immediate and full participation in the on-call list without discrimination because of their union membership or support for the Union and without prejudice to their seniority or any other rights and/or privileges previously enjoyed, if any." Respondents rejected Region 13's proposal that the Shaw Crew be reinstated with "seniority or any other rights and/or privileges previously enjoyed." Respondents objected to discharging the New Riviera Crew or to giving the Shaw Crew any seniority or preferential treatment over the New Riviera Crew. The Region ultimately agreed to the terms and language proposed by Respondents for the reinstatement and recall of the Shaw Crew employees, including backpay for the period of October 4, 2014 to September 21, 2015.

Respondents signed the Settlement Agreement and Notice to Employees on March 28, 2016. The settlement included a non-admissions clause stating that, "[b]y entering into this Settlement Agreement, the Charged Parties do not admit to having violated the act." On the same date, Jerry Mickelson, Jam's Chairman, Vice President and Secretary, sent a Memorandum to Emami implementing the foregoing provision of the Notice.⁵ Mickelson's Memorandum stated, in pertinent part:

As part of that settlement, the companies have agreed that, effective now, you, as the person who hires stagehands for [Riviera] . . . will offer the . . . former [Shaw] crew (names are listed below) "immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre from October 4, 2014 to September 21, 2015 without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner.

. . . To be clear, you may hire whomever you think is best and appropriate for jobs. But union support or membership, or lack of support or membership in the union, may not

⁵ The parties stipulated that Mickelson and Emami acted as supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act on behalf of Jam and Event Productions, respectively.

play *any* role – NONE – in the hiring decisions you make. *And* you have to give fair consideration to Jolly’s former crew. No doubt, you have people whom you are now using whom you know and trust. But in order to be fair to [Shaw’s] former crew, I want you to make sure that you give people a chance – especially people who were most active at the [Riviera]. In order to show your and our good faith in this, I would like you to make a particular effort to choose among [Shaw’s] former crew as stagehands for the immediately upcoming [Riviera] shows on April 1 (if possible), 7, 14, 15 and 16. . . . You must make sure that you *continue* to hire stagehands in a completely non-discriminatory manner. (Emphasis in original.)⁶

On April 4, 2016, counsel for the Union sent the General Counsel an email objecting to the proposed settlement in Case 13-CA-160319, specifically, the agreement’s inclusion of a non-admissions clause and failure to mention the Shaw Crew’s seniority rights upon reinstatement. The General Counsel responded the same day, explaining that the settlement agreement’s non-discrimination provision fully remedied the alleged unfair labor practices. Neither communication was provided to Respondents in connection with the Settlement Agreement. The Region subsequently approved the Settlement Agreement and Notice over the Union’s objection.

On April 5 and 6, 2016, Respondents requested that the Region provide current contact information for the Shaw Crew so they could be offered work. On April 8, 2016, the Region sent Respondents the final backpay calculations for the Settlement Agreement.

C. Shaw Crew Employees Are Recalled

After receiving the March 28, 2016 memorandum from Mickelson, Emami began offering and assigning work to the former Shaw Crew employees. Emami proceeded with the belief that “full participation” by members of the Shaw Crew meant that they would share the work equally with the New Crew employees. Emami was not otherwise instructed on how to offer work to the Shaw Crew members, except to “make an effort to use those listed as the ‘most active.’”⁷ In this regard, Emami kept a log reflecting the events at the Riviera, the name of each person he contacted to work that event, how he contacted the individual (text or call), the date and time of the contact, whether he succeeded in making contact, and the individual’s response.⁸

From the combined group of employees that Emami had to pick from, the Shaw Crew comprised 47% and the New Riviera Crew amounted to 53% of the group. Emami subsequently made 54% of his offers to the Shaw Crew and 46% to the New Riviera Crew. The Shaw Crew’s most utilized stagehands – Gregor Kramer, Paul Repar, Archie Yumping and Justin Huffman – received the most offers. Nevertheless, Emami’s logs indicate that they too received fewer opportunities after reinstatement. Kramer previously worked 97% of shows, but was called by Emami for 74% of shows; Huffman previously worked 80% of shows, but Emami called him only half of the time. Almost all of the rest of Shaw Crew received less calls after reinstatement. Overall, Shaw Crew members filled 48% of the all-day slots and 46% of the total slots.

⁶ The lists attached to Mickelson’s memorandum identified 22 individuals as “Most Active Working Riv Shows” and 24 individuals as “Additional Crew Available To Work.” (Joint Exh. 19.)

⁷ Joint Exh. 24 at 4-10.

⁸ Joint Exh. 27.

In some instances, Shaw Crew contacted by Emami refused offers of employment or were unavailable. Some informed him that they were unavailable due to scheduling conflicts with work assignments for employers other than Respondents; one Shaw Crew member, Archie Yumping ignored Emami's offers of employment; Gabriel Thompson relocated to another state; Brent Benson has a serious medical condition that prevents him from working; and Brad Sikora passed away

D. Charges Are Filed After Respondents Recall Shaw Crew Members

On June 7, 2016, the Union filed an unfair labor practice charge against Respondents in Case 13-CA-177838 alleging that they failed and refused to offer the Shaw Crew employees “full participation in the on-call list because of their protected, concerted, union activity; in retaliation for their being named discriminatees in the complaint and settlement agreement; and in violation of the terms of the settlement agreement.”

On July 13, 2016, the Regional Director notified the Union that Region 13 would not pursue the charge:

We have carefully investigated and considered your charge [and] [f]rom the investigation, the evidence is insufficient to show that the Employer has failed and refused to offer the employees named as discriminatees in Case 13-CA-160319 full participation in the on call list for work assignments, as required by the settlement agreement that was reached in that case, because of their engagement in protected concerted or union activity, or because they were named as discriminatees in the Complaint or Settlement Agreement. Further, the evidence is insufficient to show that the Employer is in violation of the express terms of the settlement agreement reached in Case 13-CA-160319.

The Charging Party appealed the dismissal of charges in Case 13-CA-177838. On October 19, 2016, after considering the Charging Party's appeal as a request for reconsideration and newly submitted evidence, the Regional Director reversed his decision and revoked the dismissal of charges.

LEGAL ANALYSIS

The General Counsel and Charging Party contend that Respondents unlawfully discriminated against Shaw Crew members in violation of Sections 8(a)(3), (4) and (1) by reducing their work hours and, thus, denying them “immediate and full participation” upon reinstatement after the settlement of Case 13-CA-160319. Respondents insist that the Shaw Crew employees were reinstated in accordance with the terms of the settlement and were afforded work opportunities at the Riviera Theatre through the on-call list in a non-discriminatory manner.

The resolution of the unfair labor practice allegations depends on an interpretation as to what the General Counsel and Respondents intended by the “immediate and full participation in the on-call list” by Shaw Crew employees in the settlement agreement in Case 13-CA-160319.

Respondents highlight the settlement discussions between the parties in Case 13-CA-160319 that resulted in a settlement agreement over the objection of the Union. The Union specifically objected to the inclusion of a non-admissions clause and the omission of a provision assuring the reinstated Shaw Crew employees of seniority in the on-call list.

In his brief, the General Counsel objected to the admissibility of settlement discussions in determining the meaning of the settlement agreement. Those discussions, in the form of emails exchanged between counsels in Case 13-CA-160319, are relevant and admissible for two reasons. First, to the extent that the General Counsel objection relies on the inadmissibility of evidence of settlement related discussions pursuant to FRE Rule 408, that argument lacks merit. Evidence of discussions relating to a settlement agreement is admissible in determining the meaning of its contents. *Basha v. Mitsubishi Motor Credit of America, Inc.*, 336 F.3d 451 (5th Cir. 2003) (settlement-related letters between parties admissible where not used to establish liability, but, rather, to interpret parties' settlement agreement); *Central Soya Co., Inc. v. Epstein Fisheries, Inc.*, 676 F.2d 939, 944 (7th Cir. 1982) (explaining that evidence relating to a settlement is admissible to explain the settlement's terms).

Second, the parties reasonably disagree as to whether "immediate and full participation in the on-call list" requires a return to the on-call list previously used for the Shaw Crew or simply inclusion into an on-call list with the New Riviera Crew. As it relates to "seniority and any other rights and/or privileges previously enjoyed" by Shaw Crew employees, the phrase is silent and thus unclear or susceptible of more than one interpretation. In a case where the wording of a provision is ambiguous, as it is here, the Board applies established rules of contract interpretation and considers extrinsic evidence. *Sanitation Salvage Corporation*, 342 NLRB 449, 451-52 (2004), citing *Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1037 (2003); *Sansla, Inc.*, 323 NLRB 107, 109 (1997).

The extrinsic evidence in this record, however, is also inconclusive as to what the parties intended in the settlement agreement. Respondents rely on the General Counsel's inclusion of seniority language in the initial draft of the settlement agreement and its removal from the final version of the agreement, over the Union's objection, after Respondents rejected that language. On the other hand, there is evidence that the General Counsel, in responding to the Union's objection, expressed his opinion that the final version of the settlement agreement preserved the Shaw Crew's seniority rights notwithstanding the omission of specific language to that effect.

The patent ambiguity of the requirement that Respondents provide the Shaw Crew with "immediate and full participation in the on-call list" is further evident from the agreement to make whole the Shaw Crew employees for the entire backpay period, while omitting any reference to the rights of the New Riviera Crew that replaced the Shaw Crew members during that period. Indeed, the settlement agreement fails to mention the New Riviera Crew in any way.

The Board has always encouraged voluntary settlements of unfair labor practice claims. Based on the evidence, however, it is evident that there was no meeting of the minds as to Respondents' obligations under the settlement agreement in Case 13-CA-160319 upon which the parties premises their theories of this case. Accordingly, it will be recommended that the Board set aside the settlement in Case 13-CA-160319, reinstate those allegations, and remand that case to the Division of Judges for a trial of both the reinstated allegations and those in the instant

complaint, and to make the necessary findings, analysis, and conclusions of law. See *Doubletree Guest Suites Santa Monica*, 347 NLRB 782, 784 (2006), citing *Howard Electrical & Mechanical*, 293 NLRB 472, 472 fn. 2, 490 (1989), enfd. mem. 931 F.2d 63 (10th Cir. 1991).

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CONCLUSIONS OF LAW

1. Respondents Jam Productions, Ltd. and Event Productions, Inc. are a single-integrated business enterprise and a single employer within the meaning of the Act, and are employers engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

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2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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3. On September 16, 2015, the following employees, collectively referred to as the Shaw Crew, were discharged by Respondents: Danny Alvarez, Mike Alvarez, James Bartolini, Karlis Baumanis, Brent Benson Jr., Lester Berry, Edward J Bilecki, Scott Bulawa, Todd Carter, Christopher C Chambers, Don Corney, Nick Curry, Alek Dombrovskis, Jerome Fritz, Zachary Fritz, Tom Garrity, Willie Gee, Christopher Glazebrook, Bryan Gonzalez, Sean D Gunn, Justin Huffman, Joe Kelly, Gregor Kramer, Chris Leggett, Joe Lyons, Bryan Mangnall, Michael Mulvey, Quintin Muntaner, Bertil Peterson, Chris Phipps, Martin Pollack, Paul Repar, Adam Ross, Tom Roszel, Eric D Sanders, Brad Sikora, Louis Svitek Jr., Gabriel Thompson, Paul Wright, Archie Yumping, Steph Tremius, Devonte Jackson, Charlie Naese, James Curry, Evon Peterson, Kristopher Brunnell, Joe McNulty, Tim Taylor, Ken Kinder, Mike Howe, Kasia Kozsiol, Eric Pospishil, Louis Svitek IV, Dan May, and Peter Falk.

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4. On April 6, 2016, the Regional Director of Region 13 of the National Labor Relations Board approved a settlement agreement and notice reinstating the Shaw Crew employees disposing of the allegations in Case 13- CA-160319. In the accompanying Notice to Employees, Respondents agreed, among other things, to offer the Shaw Crew "immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner."

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5. On and after April 7, 2016, Respondents began offering work equally to the Shaw Crew and New Riviera Crew employees. By sharing the work opportunities at the Riviera Theatre with the New Riviera Crew employees, most Shaw Crew members received significantly less work than before they were discharged on September 16, 2015.

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6. The March 28, 2016 settlement agreement between the General Counsel and Respondents to offer the Shaw Crew employees "immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner" was patently ambiguous, establishes that there was no meeting of the minds between the parties on this issue, and is unenforceable.

REMEDY

5 The agreement in Case 13- CA-160319 between the General Counsel and Respondents to
offer the Shaw Crew "immediate and full participation in the on-call list for work of the type
they performed at the Riviera Theatre without discrimination because of their union membership
or support for the Union, and offer them work in a non-discriminatory manner" was ambiguous
and unenforceable. That settlement agreement is an integral element of the allegations in this
case. Accordingly, I shall recommend that the Board set aside the settlement in Case 13-CA-
160319, reinstate those allegations, and remand this proceeding to the Division of Judges for a
trial of both the reinstated allegations in Case 13-CA-160319 and those in the instant complaint,
and to make the necessary findings, analysis, and conclusions of law.

15 On these findings of fact and conclusions of law and on the entire record, I issue the
following recommended⁹

ORDER

20 The settlement agreement in Case 13-CA-160319 is set aside, the allegations in that
complaint are reinstated and remanded to the Division of Judges for a trial of both the reinstated
allegations in Case 13-CA-160319 and those in the instant complaint, and to make the necessary
findings, analysis, and conclusions of law.

Dated, Washington, D.C. May 26, 2017

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Michael A. Rosas
Administrative Law Judge

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.